No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 24-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing a petition for a writ of certiorari was extended to August 14, 1954, by order of Mr. Justice Minton, and the petition was filed on July 30, 1954. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was basis in fact for the denial by the Selective Service System of petitioner's claim to classification as a conscientious objector.

2. Whether the court below erred in affirming the quashing of a subpoena to produce confidential F.B.I. records, submitted to the Department of Justice hearing officer, in order to enable petitioner to compare their contents with the resumé of adverse information orally given him at the time of his hearing.

3. Whether a sufficient resumé of such information was given to petitioner.

STATUTE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. 456(j)), provides in pertinent part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociologi-

cal, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are

found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois which, after a trial without jury, found petitioner guilty of refusing on February 9, 1953, to be in-

ducted into the armed services in violation of the Universal Military Training and Service Act (R. 1, 3, 14).[1]

Petitioner's record with the Selective Service System may be summarized as follows:

On September 10, 1948, petitioner, who was then age 21 and single, registered under the Selective Service laws in Waukegan, Illinois (R. 17, 38, 39-40).[2] In his Selective Service questionnaire which he returned on December 6, 1948, he indicated that he was employed as a chauffeur at the Great Lakes Naval Training Center, in Great Lakes, Illinois; that he had entered into this employment on February 9, 1948; that he expected to continue in this work indefinitely (R. 43); and that he had no other employment (R. 44). He indicated as his educational background eight years of grade school and 2½ years of high school (R. 44). He left blank the space in which conscientious objectors indicate their claim to such status (R. 44); he certified that he was not a minister (R. 43); and he stated his belief that his classification should be 1-A (R. 44-45). Petitioner was admittedly not a conscientious objector at this time (R. 25-26). On the basis of the information contained in this questionnaire, petitioner's Selective Service Board classified him 1-A on December 23, 1948 (R. 45).

On March 5, 1949, petitioner was married (R.

[1] Petitioner was given a sentence of two years' imprisonment (R. 14-15).

[2] Petitioner was rejected for service in the armed services in 1943 (R. 40).

16). On May 25, 1951, he was ordered to report for a physical examination (R. 70), but this was cancelled on May 31, 1951, in a letter advising petitioner that his file would be reviewed, apparently because of the change in marital status since his questionnaire had been submitted (R. 69). On June 4, 1951, he was reclassified 3-A, and was notified on June 6, 1951, that he had been granted a dependency exemption (R. 45).

On October 22, 1951, petitioner was again tentatively placed in class 1-A (R. 27, 45) and he was sent a classification notice to this effect on October 23, 1951 (R. 45).[3] On October 25, 1951, petitioner was sent a special form for conscientious objectors by his local board at his request, which he executed and returned on October 30, 1951 (R. 28, 46-51). This form indicates that petitioner affixed his signature to that part of the form set forth for those claiming exemption from participation in war in any form or in non-combatant training (R. 46). In answer to the question under which circumstances he believed in the use of force, he replied (R. 47) "None whatsoever. Unless it be under the supervision of Jehovah God." He stated that the public expression of his views was made "from House to House, and on the street in Waukegan, Illinois" (R. 48), and although he did not further

[3] This reclassification apparently came about because of the provisions of the Act of June 19, 1951, ch. 144, title 1, sec. 1(o), 50 U.S.C. App. 456(h), which removed the President's authority to defer married men who have no dependents (other than a wife) solely on the basis of the marriage, unless extreme hardship is involved.

explain his activities he stated that he spent "45 hours a month in the service of Jehovah God" (R. 48). He indicated that his education ended after 2½ years in high school, and that he had been up to 1951 (and apparently still was) a federal civil service chauffeur in the Great Lakes Naval Station (R. 48; see also R. 53).[4]

By letter dated October 30, 1951, petitioner was notified to appear for a physical examination on November 13, 1951 (R. 70). After examination he was found acceptable for induction and he was so notified (R. 68). On November 26, 1951, petitioner's local board classified him 1-A and advised him of this fact on November 27, 1951 (R. 17, 40, 45). Following such notification, petitioner requested a hearing (R. 71) "to give further proof of my ministry", saying nothing of a claim to being a conscientious objector.

At this hearing which was held before his local board on December 10, 1951 (R. 17), petitioner appeared alone without witnesses, and the only mate-

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[4] On the trial of this case, petitioner testified that he had filled out the special form for conscientious objectors to support his claim to being a minister, and that he thought that in making this application he was applying for a minister's classification (R. 28-31). He admitted that he did not discuss his conscientious objector claim with the board (R. 31) but took the position that as a minister, who had made a covenant to serve in that capacity, he had to be a conscientious objector (R. 29-31).

Petitioner testified that he was ordained as a minister on October 28, 1951 (R. 24). Since his conscientious objector form was received at his local board on October 30, 1951 (R. 46), it would appear that his ordination was simultaneous with the claim of exemption.

rial submitted to the board was his special form for conscientious objectors (R. 27), and a booklet that he showed the board members, entitled "God and the State" (R. 30).[5] The minutes of the board reflect that petitioner gave substantially the same evidence orally that he set forth in his special form, and that "he made the statement he was seeking classification as a minister and *not* as a conscientious objector" (R. 68-69). Petitioner admits that he furnished evidence at the hearing (R. 18) "in support of my ministry" and that he did not inform the board that he desired exemption as a conscientious objector (R. 27-28, 31). Petitioner told the board that he had been an unordained minist . of Jehovah's Witnesses since December 1950, but that he was not ordained until October 1951 when that became his "regular vocation" (R. 18). The board members, petitioner contends, questioned him concerning his education for the ministry and when he told them that he had not gone beyond 2½ years of high school, expressed some doubt as to his qualification as a minister (R. 18).

The board notified petitioner by letter dated December 11, 1951, that the evidence was insufficient to merit reopening his 1-A classification (R. 18, 66). Petitioner answered by letter received at the local board on December 18, 1951, stating that he was a "regular minister of religion", and that he wished to appeal his case to the Appeal Board (R. 64-65).

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[5] There is also a letter in the record restating petitioner's claim that he was a minister, presumably filed with the local board after the hearing (R. 66-68).

After his records were forwarded to the Appeal Board (R. 40-41), he was tentatively classified 1-A, and it was determined that he failed to qualify for either of the two forms of conscientious objector status, 1-A-0 or 1-0 (R. 45-46).

On August 28, 1952, a conscientious objector hearing was conducted before a Department of Justice hearing officer. Petitioner attended, bringing his wife as his only witness (R. 19, 32-33). During this hearing, according to petitioner's own testimony, the hearing officer told him that his F.B.I. report stated that he had been "hanging around pool rooms", and asked him whether he still was doing so, to which question he replied in the negative (R. 19). Petitioner's wife who was present in the hearing room was asked how petitioner was treating her and she replied, "fine" (R. 19). The hearing officer recommended against reopening petitioner's classification (R. 54). The Department of Justice recommendation adopted this position. It noted that while there was some evidence of present sincerity, the entire record did not support deferment. The report mentioned that petitioner has been known to one informant as "a rather heavy drinker and crap shooter in and around local taverns and pool halls", although that informant believed that he was then sincere. It also noted that police records showed that petitioner was arrested May 29, 1950, on a complaint by his wife that he pulled her out of a car and hit her in the face, for which crime he was fined; that police were called to settle a "hot argument" on

June 12, 1950; and on January 6, 1952, petitioner's wife made a complaint to police that petitioner was abusive. (R. 54.) It emphasized that petitioner did not claim to be a conscientious objector when he mailed his questionnaire in 1948, and that his religious activities were coincident with pressure from the draft.

On December 17, 1952, the Appeal Board by vote of 3 to 0 again classified petitioner as 1-A (R. 19, 41).

On January 6, 1953, petitioner was ordered to report to his local board for forwarding to an induction station on January 16, 1953 (R. 35, 56-57). On that day his physical examination was not completed and it was necessary for him to report back on January 22nd and January 27th, on which later date it appeared that his examination records had been misplaced and he was told to call in for further information (R. 36-37, 60-62, 63-64, 71-72). He received permission from his local board to go back to work until February 9th, when he was told to report for induction (R. 36-37).

On January 20, 1953, fourteen days after his order to report for induction, petitioner filed an affidavit with his local board signed by a doctor, and stating that petitioner's wife was then a patient in a tuberculosis sanitarium and that she would be dependent on her husband for care when she left the sanitarium (R. 63; Gov't Ex. 1-W). He told the clerk of his local board that he wished to have his classification reopened on the ground of dependency and family hardship, and, according to his own testimony, he was told that when the

board met they would consider this new claim (R. 20-21). On February 2, 1953, he was told that his classification would not be reopened (R. 22). On February 3, 1953, petitioner communicated with his State Selective Service Director and the National Director regarding his claim for dependency exemption and sent each a copy of the doctor's affidavit relating to his wife's physical condition (R. 23, 58-59). He was notified by the State Selective Service Headquarters on February 11, 1953, that since his application was not received until February 5, 1953, it was out of time (R. 59-60). On February 5, 1953, his local board had again classified petitioner 1-A (R. 39).

On February 9, 1953, petitioner reported to the induction station but refused to submit to induction (R. 37-38, 51, 55-56, 57-58, 72-73).

ARGUMENT

1. This case differs from *Sicurella* v. *United States,* No. 250, this Term, in which the government has conceded a conflict between the decision of the court below and other circuits, because in this case the record shows and the opinion below holds that there was ample basis for the selective service boards to conclude that petitioner had not established the *sincerity* of his claim to be a conscientious objector. Thus, the issue of what sincerely held beliefs may be deemed compatible with a right to deferment under the statute—the issue involved in *Sicurella*—is not reached at all in this case.

It is clear from the record that the finding against

petitioner does not rest on the recency of his conversion alone. It was the coincidence of his conversion with the imminence of his induction, the nature of his past activities, his employment at a naval station, his continued abusive treatment of his wife after his alleged conversion, the lack of any articulate concept of conscientious objection divorced from the claim to be a minister, which together led the Department of Justice and presumably the draft boards to the conclusion that petitioner had failed to establish his sincerity. The asserted conflict with *Schuman* v. *United States*, 208 F. 2d 801 (C.A. 9), does not exist. The *Schuman* decision, resting on a different set of circumstances, represents not a conflict with respect to the applicable law, but a different conclusion on the basis of different facts. The court there stressed that the hearing officer and at least one member of a two-member local board explicitly recognized the defendant's sincerity, but nevertheless rejected his claim.[6] Here, on the other hand, the facts clearly afford sufficient basis for a finding that petitioner had not shown the sincerity of his claim. Such a finding is final and unimpeachable, even if it were erroneous. *Cox* v. *United States*, 332 U.S. 442, 448-449.

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[6] We do not read the *Schuman* opinion, as does the court below (Pet. 31), as declaring that the recency of a conversion can never be taken into account. Rather, the Ninth Circuit seems to us to have held no more than that, once a classifying agency (hearing officer or board) has determined that the registrant is sincere, it cannot reject his claim for deferment simply because he has been connected with the faith for only a short time.

Petitioner also asserts a conflict with the decision in *Dickinson* v. *United States*, 346 U.S. 389, in that the government failed to overcome by any "affirmative evidence" his claim that he was a conscientious objector. But in that case, with respect to a ministerial claim, this Court found that the registrant had "made out a case which meets the statutory criteria" (p. 395), and held (p. 396) that the court below erroneously "thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence." For the factual reasons detailed above (*supra*, pp. 5-10, 12), that is not this case. This petitioner was not arbitrarily denied exemption on the basis of mere disbelief in his declarations and evidence, and the question of whether a Department of Justice hearing officer or the board would be required to credit allegations of conscientious objection, in the absence of any objective contrary evidence, is not presented under these facts.

Moreover, if the question were involved, we would support the view that the court below was correct in holding that the rule of the *Dickinson* case with respect to ministerial claims cannot be applied in totality to conscientious objector claims. In addition to the differentiating factors pointed out in the opinion below (Pet. 26-29), the legislative history of Section 6(j) providing for hearing and report by the Department of Justice, which is discussed in detail in the government's brief in *United States* v. *Nugent* (No. 540, O.T. 1952), shows that the main purpose of that section was

to provide the draft boards with an appraisal of the sincerity of a registrant's claim by an outside agency on the basis of a personal interview. As the *Nugent* decision, 346 U.S. 1, makes clear, that appraisal is not binding on the draft boards, but the statute clearly contemplates that it is a factor which the draft boards may properly consider with the other facts of record. In other words, the statute specifically, envisages that where the issue is conscientious objection (as distinguished from ministerial status) belief or disbelief in the registrant's testimonial and documentary evidence, standing alone, was definitely to be taken into account.[7]

2. Prior to the trial of this case, petitioner attempted to subpoena the confidential F.B.I. report which was submitted to the Department of Justice hearing officer at the time of the conscientious objector hearing. The government moved to quash the subpoena, and in his affidavit in opposition to this motion, petitioner's counsel stated that petitioner would have to examine the confidential report and to offer it into evidence (R. 6-9). The court granted the motion to quash (R. 9-10).

Petitioner now contends that the court erred

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[7] For these reasons, we do not agree with the dicta in *Weaver* v. *United States*, 210 F. 2d 815 (C. A. 8), and the other cases cited in the opinion below (Pet. 27), to the extent that they suggest that the principle of the *Dickinson* case fully applies to conscientious objector claims. However, there is no conflict of decision between those cases and the ruling below because, as noted above (*supra*, p. 13), there was no violation of the *Dickinson* rule here, assuming it to be applicable.

in not allowing him access to the report in order to check it against the information furnished him by the hearing officer concerning it (Pet. 22-23). The contention that a registrant is entitled to inspect such records was raised and settled in *United States* v. *Nugent*, 346 U.S. 1, where this Court said (*Ibid.* pp. 5-6):

> * * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the FBI reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair resumé of any adverse evidence in the investigator's report.

See also *United States* v. *Dal Santo*, 205 F. 2d 429, 431-432 (C.A. 7), certiorari denied, 346 U.S. 858. It cannot be presumed that the hearing officer's recommendation was based on confidential data not indicated in his report, in the absence of some showing by petitioner that such was the case. The authority of that officer is advisory and his report, together with the Selective Service file, must be deemed to cover all the pertinent data upon which the Appeal Board based its final classification order. Any other rule would necessitate a full-

scale collateral review of this auxiliary proceeding which review, for the reasons this Court noted in the *Nugent* case (346 U.S. at 8-10), is neither secured to petitioner by statute nor by his constitutional right to due process of law.

There are district court opinions, which petitioner cites [8] (Pet. 22-23), which have held that, at a trial, a registrant is entitled to have the F.B.I. reports produced for his examination [9] to test out the question whether the resumé given to the registrant by the hearing officer was a fair one. This issue was raised on a joint petition for rehearing, which was denied by this Court, filed in the *Nugent* case and its companion *Packer* case (Nos. 540 and 573, O.T. 1952, pp. 44-46). Counsel there relied on the decision of Judge Hincks in *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn.), the leading district court decision in this field which the other cases cited by petitioner have followed.

It is difficult to reconcile the *Evans* decision with the ruling of this Court in *Nugent.* It is anamolous to hold that a petitioner cannot see the F.B.I. reports before hearing, but can see them after the recommendation has gone to the Appeal Board and been acted upon. There may perhaps be special circumstances, as for example if the facts in the resumé given to a registrant are

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[8] Petitioner does not assert a conflict of circuits on this point, but cites only district court rulings. See Pet. 22-23, 37, 39.

[9] The district court opinions have held that the court need not itself first examine the reports but that the reports must be shown to the registrant, except that the names of persons interviewed may be omitted.

substantially different from those referred to in the report, where the interests of justice may require a court to examine the file. But we think that, unless such special circumstances are shown, the *Nugent* case does not permit the granting of such a subpoena as a matter of course in every case.

However, if the Court does not deem this issue determined by *Nugent,* we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal.

3. Petitioner also contends (Pet. 20-22) that the report of the hearing officer indicates that adverse evidence was not made available to him at the time of the hearing, as required by the *Nugent* decision. Reference to the report, however, indicates that he was given full opportunity to meet all of the evidence considered in that report.

One piece of information taken from the confidential file was the statement of an informant to the effect that petitioner had been personally known to him (R. 54) "as a rather heavy drinker and crap shooter in and around local taverns and pool halls", but that the informant believed that he was then sincere. Following the notation regarding this informant in the report, the hearing officer made the following notation indicative of the fact that he had gone into this issue with petitioner and discussed it with him fully (R. 54):

> Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed.

Petitioner, in fact, admitted that he had been advised that his report contained this information and in response to a question (R. 19) "Do you do that now?", he answered in the negative.

The hearing officer's report also refers to "police records" indicating various instances when petitioner physically abused his wife (R. 54). This information was certainly available to the petitioner at all times, being a matter of public record, and the report does not indicate that it was taken from confidential sources. Petitioner's testimony indicates that the hearing officer questioned his wife in his presence concerning his treatment of her, and she answered that he had been treating her "fine" (R. 19). We fail to perceive any support for the contention that all relevant information was not available to petitioner, or that his classification was based on confidential data of which he was not advised.

Petitioner's present argument seems to come down to a contention that the *Nugent* decision requires that each claimant be furnished in a formalized document a detailed analysis of all adverse material available to the hearing officer. We find no such requirement set forth in that decision. This Court stated that the advisory conscientious objector hearing provided for in the statute does not comprehend (346 U.S. at 7) "formal and

litigious procedures", nor is it a "full-scale trial" (*Ibid.* p. 9). We interpret the decision to mean that the claimant is entitled to be informed, at least orally at the hearing, of the "general nature and character of any evidence which [is] unfavorable to his claim" (*Ibid.* p. 6, fn. 10), in order that he may meet each such issue and in order that the possibility of a finding based on evidence of which he was not fairly informed may be precluded. That was done in this case, and no more formalized procedure is constitutionally requisite, nor is it provided for by statute.[10]

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[10] No court of appeals has held that the claimant is entitled to a full formal summary of the adverse evidence in the file. See Pet. 37. An argument substantially similar to that made by petitioner was made in the petition for rehearing in the *Nugent* and *Packer* cases (*supra*, p. 16).

CONCLUSION

The decision below is clearly correct on the facts, and the general issues of law presented by petitioner are either not actually involved or do not call for review at this time.[11] It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, unless the Court desires to grant a limited writ for the reason stated above at p. 17.

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[11] The contention (Pet. 5-6) respecting the doctor's letter submitted to the local board on January 20, 1953, after petitioner had received his notice to report, is obviously peculiar to this case. The petition does not discuss it under the heading "Reasons for Granting the Writ" (Pet. 13-23).

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